Journal of Air Law and Commerce

Volume 38 | Issue 3 Article 5

1972

Federal Rule 23 - An Exercise in Utility

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FEDERAL RULE 23—AN EXERCISE IN UTILITY

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ANY ATTEMPT to review the law of class actions within the compass of this brief presentation necessarily involves all of the weaknesses of a "survey course": repeating much that is obvious, omitting much that is important and leaving penetrating insights to more profound treatises.

The title of this article reflects this authors personal view that, on balance, rule 23 is an extremely useful device. But it must be acknowledged that the class action rule poses great difficulties in application; many lawyers and judges who would be inclined to add a letter to the last word of the title.

A class action under federal rule 23 is simply a method of handling a large number of related claims in one large lawsuit rather than in a large number of small lawsuits. Ideally, the threshold determinations required of the court should be made with a single objective: to dispose justly of all claims with the minimum burden on the totality of judicial resources, including courts, lawyers and litigants. These determinations include resolving the following questions: how many are too many claims to handle in the case; how many are too few to deserve designation as a class; do the common issues really predominate over individual issues; are management problems insurmountable; and what is really the best way to handle the entire bundle of disputes?

In committing these and similar questions to the discretion of the district judge, rule 23 undoubtedly achieves the valid objective of insuring flexibility. No rigid rule could accommodate the variety of factual situations and competing equitable considerations that

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the complexities of modern life and the ingenuity of counsel can bring into focus. The greater the scope of permissible judicial discretion, however, the less likely is it that similar cases will be decided alike. Moreover, achieving equality of justice should be the ultimate goal of adjective as well as substantive law.

One striking feature of rule 23 is the degree of control given a judge over the magnitude of his own work-load. Happily, this is not usually translated into "How much work can I avoid?", but rather "How can I best utilize the totality of available resources?" It can be argued, however, that courts should adjudicate the claims of litigants, instead of making choices among cases to be entertained. Since class actions may be the only feasible way to right large numbers of small wrongs, perhaps judges are given too much of a legislative, policy-making role when they are empowered to grant or withhold the class action remedy and thus to control the direction and scope of challenges to the "establishment."

This article will attempt to review briefly some recurring problem areas in the application of rule 23. Those areas that have evoked differing judicial responses will be given particular scrutiny with occasional suggestions concerning acceptable solutions.

I. Size of Class

The first prerequisite for class action treatment prescribed by rule 23 relates to the size of the proposed class; the class must be "so numerous that joinder of all members is impracticable."[1] The burden is on the proponents of the class to show that this requirement is met.[2] Moreover, uncertainty about whether the class is large enough has been held to be sufficient reason for denying class action treatment,[3] at least until the uncertainty is removed.[4]

The numerosity requirement was not altered by the 1966 amendments to rule 23. Deciding what number of legal entities it would be "impracticable" to join individually necessarily involves *ad hoc* considerations, and the reported decisions, both before and since the new rule, provide imprecise guidelines. Classes as small as thir-

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[1] Fed. R. Civ. P. 23(a)(1).

[2] DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968).

[3] Cannon v. Texas Gulf Sulphur Co., 53 F.R.D. 216 (S.D.N.Y. 1971).

[4] Kinzler v. N.Y. Stock Exchange, 53 F.R.D. 75 (S.D.N.Y. 1971).

teen,[5] twenty-four,[6] and thirty-five to seventy[7] have been approved. But a class of forty-eight has been held to be too small to warrant class action treatment;[8] and one district court has even held that a class of 350 did not satisfy the numerosity requirement, since litigation involving that number of claimants had been handled on an intervention basis in state courts.[9]

If all of the members of the class are not readily identifiable, practical convenience may dictate approval of class action treatment for somewhat smaller numbers of potential claimants than when the members of the class are identifiable. But even when all members are identified, there would seem to be no compelling reason to insist upon individual joinder, if to do so would impose undue burdens upon the court (*e.g.*, docket clerks) or upon counsel and their staffs.

Ordinarily, the parties adverse to the class have little to gain by objecting to class action treatment on the ground that the class is too small; indeed, it may often be advantageous to both sides to permit the action to proceed on a class basis. Of course, the number of potential class members can be so small that even the most generous definition of the term "impracticable" cannot reasonably be said to apply to the prospect of individual joinder, or so small that even the minimal burdens of class action procedures ought not to be assumed. Modest reductions in paper-work alone clearly cannot justify departure from the normal pattern of direct litigation.

The language of rule 23 does not seem to permit relaxation of the numerosity requirement on the basis of factors unrelated to class size, such as the amounts of individual claims or venue problems. Under a literal reading of rule 23 if the class is small enough to permit individual joinder on a workable basis, the fact that individual claims are too modest to warrant the expense of such litigation is immaterial. Nevertheless, it is likely that these ex-

[5] Dale Electronics, Inc. v. R.C.L. Electronics, Inc., 53 F.R.D. 531 (D. N.H. 1971) (defendant class, not all amenable to process otherwise).

[6] Philadelphia Electric Co. v. Anaconda Am. Brass Co., et al., 43 F.R.D. 452 (E.D. Pa. 1968).

[7] Fidelis Corp. v. Litton Industries, Inc., 293 F. Supp. 164 (S.D.N.Y. 1968).

[8] Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972).

[9] State of Utah v. American Pipe & Constr. Co., 49 F.R.D. 17 (C.D. Cal. 1969).

traneous practical considerations may have some influence upon a court's discretion in the matter.[10]

It would be unrealistic to expect all judges to agree on precisely what number may, and what number may not, join individually without excessive inconvenience. If any norm can be derived from analysis of reported decisions, it would seem to be this: the line of demarcation between classes that are presumptively large enough and those that are presumptively too small for class treatment probably falls somewhere in the range of twenty to thirty potential members, in actions for damages. It must be conceded, however, that this attempted distillation may well represent merely the individual view of the writer concerning what constitutes a reasonable rule-of-thumb.

In actions for injunctive or declaratory relief under 23(b)(1) or 23(b)(2), the numerosity requirements are the same, at least in theory; but since the distinctions between class and non-class treatment in these cases usually have less practical significance than in rule 23(b)(3) actions, decisions about whether to approve class treatment are often somewhat perfunctory, perhaps with more flexibility in assessment of numerosity standards. Indeed, if the representative plaintiffs are likely to pursue the litigation in any event—and this is usually the case— the parties adverse to the class have little reason to object to class treatment.

Rule 23 does not expressly impose any maximum limit to the size of a class; any restriction on size must emerge from considerations of manageability under rule 23(b)(3)(D).

II. Existence and Predominance of Common Questions

The further requirement of rule 23(a) that there be "questions of law or fact common to the class" is virtually self-explanatory.[11] In view of the provisions of rule 23(c)(4) permitting class action treatment with respect to particular issues, and authorizing plurality of classes and sub-classes, it can be said fairly that most proposed class actions qualify for some kind of class action treatment under this minimum standard.

In the case of rule 23(b)(3) actions, the court must further find

[10] *See, e.g.*, Dale Electronics, Inc. v. R.C.L. Electronics, Inc., 53 F.R.D. 531 (D. N.H. 1971).

[11] Fed. R. Civ. P. 23(a)(2).

that the common questions "predominate over any questions affecting only individual members."[12] It is doubtful whether this language really adds much to rule 23 in light of rule 23(c)(4). Since an action may be maintained as a class action for particular issues, predominance of common questions in those issues would seem inevitable if they actually are common to the class. Perhaps the predominance requirement is best interpreted as cautioning that the "particular issues" selected for class treatment should not be too narrowly defined.

Since a lawsuit is essentially composed of three elements, wrongful conduct, causation (impact) and damages, the first element is almost certain to involve predominant common issues; the second element is quite likely to involve common issues, which may or may not predominate; and, except when unusual methods of calculating damages are employed, the third element is almost certain to involve largely individual issues. Consequently, it would seem desirable to permit class treatment only when the common questions are predominant within the context of one or more of the three basic elements mentioned above. This is not to suggest that *all* 'liability' or 'impact' issues must be common to the class. Nevertheless, troublesome problems may arise (*e.g.*, in applying statutes of limitation to the claims of passive class members) if the only issues asserted by the class representative do not substantially determine liability to the class. Perhaps this is but another way of saying that a class action would not be "superior" within the meaning of rule 23(b)(3) if separate litigation of controlling liability issues would be necessary in any event; and of emphasizing the importance of early determination of class action questions, and early notice to the class.

III. Adequacy of Representation

The class representative must have claims or defenses that typify those of the class;[13] he must "fairly and adequately" represent the class;[14] and, of course, he must not have interests that conflict with the interests of other class members.[15]

[12] Fed. R. Civ. P. 23(b)(3).

[13] Fed. R. Civ. P. 23(a)(3).

[14] Fed. R. Civ. P. 23(a)(4).

[15] Hansberry v. Lee, 311 U.S. 32 (1940).

Thus, it has been held that a trade association having no typical claim of its own cannot act as a representative of its members in class litigation.[16] More recent cases appear to relax this requirement, however, at least in the area of civil rights.[17] And while some courts have insisted that class representatives in cases involving racial discrimination must themselves be objects of the precise discrimination complained of,[18] the Supreme Court has held otherwise.[19]

There is no requirement that the representative must himself have a substantial claim; this criterion might well frustrate the salutary purposes of rule 23.[20]

Termination of the representative's membership in the class by reason of factors beyond his control does not preclude recovery by the other class members,[21] nor, according to some decisions, does mooting of the individual claim of the class representative.[22] In these situations, adequate representatives can be substituted.

Among the situations in which conflicts of interest seem particularly likely to arise are those in which the total resources available to satisfy judgments are less than the total of the recoveries that vigorous representation of the class would produce, and those in which different kinds of damages may properly be sought by various class members. In addition, conflicts, in varying degrees of intensity, frequently arise in connection with proposed compromise settlements and are almost inevitable in connection with awards of counsel fees.[23]

It is to be expected that interesting and difficult problems of conflicting interests and re-definition of classes may arise as class ac-

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[16] Alabama Independent Service Station Ass'n v. Shell Petroleum Corp., 28 F. Supp. 386 (N.D. Ala. 1939); Farmers Coop. Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942).

[17] Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

[18] Palmer v. Thompson, 391 F.2d 324 (5th Cir. 1967), *aff'd*, 403 U.S. 217 (1970).

[19] Lee v. Washington, 390 U.S. 333 (1968), *aff'd* 263 F. Supp. 327 (M.D. Ala. 1966) (three-judge court).

[20] Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

[21] Wymelenberg v. Syman, 54 F.R.D. 198 (E.D. Wis. 1972) (death of wife of representative of class of would-be plaintiffs in divorce).

[22] Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971); *but see* Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1970); Committee to Free the Fort Dix 38 v. Collins, 429 F.2d 807 (3d Cir. 1970).

[23] *See* Part VI of the text.

tions in the area of ecology proliferate. There is no provision for "opting-out" of a rule 23(b)(1) or rule 23(b)(2) class,[24] yet not all of the inhabitants or taxpayers in a given community may wish to enjoin an industrial polluter whose operations are a mainstay of the local economy. In a somewhat analogous case involving a pension fund dispute, the First Circuit has held that the named plaintiff could represent those beneficiaries sharing his views, while the defendants could represent the beneficiaries taking a contrary position.[25] A rational re-definition of the class or classes on the basis of objective criteria can more readily be achieved, however, in the case of beneficiaries affected differently by a pension plan than in matters of ecology. It seems doubtful that "all residents who want to get an injunction against X Company" would be an adequate description of a class under rule 23.

It has been held that when eighty per cent of the stockholders of a corporation oppose plaintiff's attempts to enjoin a merger, plaintiff is an inadequate representative because of his conflicting interests, hence a class action is inapproprite.[26] Whether this approach should be adopted in the hypothetical ecology situation; whether it would be appropriate if a majority agreed with the plaintiff; and whether the views of the class members could be accurately ascertained, are questions that the developing case law may ultimately answer. Perhaps the dilemma could be avoided by treating the litigation under rule 23(b)(3), thus permitting withdrawals from the class; if so, it might be desirable to minimize notice requirements.

IV. Superiority of Class Action; Management Difficulties

Class action status may not be accorded under rule 23(b)(3) unless the judge finds that this would be "superior to other available methods for the fair and efficient adjudication of the controversy."[27] In making a finding on this subject, the court is required to consider, *inter alia*, "the difficulties likely to be encountered in the management of a class action."[28] It is these areas in which judicial dis-

[24] *E.g.*, Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 897 (1971).

[25] Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969).

[26] Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970).

[27] Fed. R. Civ. P. 23(b)(3).

[28] Fed. R. Civ. P. 23.

cretion is least trammeled by articulated standards, and in which occur the greatest disparities.

To some extent, inconsistencies in treatment of these questions can undoubtedly be traced to differences in judicial philosophy. But this author suggests that much of the seeming contradiction in judicial pronouncements on these subjects arises not from different answers to the same questions but from differing perceptions of the questions to be answered.

It bears emphasis that management difficulties are not an independent ground for denial of class treatment but merely one factor to be weighed in determining whether a class action is superior to other *available methods* for handling the controversy. The choice is not between class action treatment and no litigation; the judge is not authorized to indulge the hope that the controversy will simply vanish. Rather, what is required is a survey of "other available methods for the fair and efficient adjudication of the controversy"[29] for purposes of comparison; only if there is some equally promising alternative can class action treatment ordinarily be denied.[30] One of the principal objects of rule 23, after all, is "to facilitate the joining of multiple small actions that would otherwise not be brought, and to prevent repetitious litigation of claims."[31]

Among the alternatives to be considered are: (i) intervention under rule 24; this is, of course, the fundamental alternative posed in applying rule 23(a) criteria and presumably will have been ruled out as a totally satisfactory solution before reaching rule 23(b)(3) issues; (ii) separate individual actions, with agreement for "test case" disposition; this requires unusually cooperative counsel, and may involve its own management difficulties; (iii) separate individual actions, with application of expanding concepts of collateral estoppel.[32] This alternative may prove acceptable in many situations but, like the "test case" approach, does not reduce the number of suits filed; and (iv) separate individual actions, with pretrial consolidation under section 1407, perhaps followed by

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[29] FED. R. CIV. P. 23(b)(3).

[30] Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972), *reversing* 50 F.R.D. 57 (S.D.N.Y. 1970).

[31] Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1969).

[32] *Cf.* Blonder-Tongue Lab., Inc. v. Univ. of Illinois Foundation, 402 U.S. 313 (1971).

transfer for all purposes under section 1404; or with transfers under section 1404 followed by general consolidation. In reality, these suggested alternatives are not alternatives at all in most situations, but rather methods of handling related class actions and of insuring uniform class determinations in related litigation. If the prerequisites of a class action are present, the availability of sections 1404 and 1407 provide no reason to deny class treatment.

Some kinds of cases fit within the class action mold less comfortably than others. Traditionally, tort claims for personal injury, or defamation, for example, have been individually litigated; this is not surprising in view of the usual magnitude of each claim and its importance in the life of the individual. Moreover, the contingent-fee concept has generally made it feasible for claimants to litigate regardless of their financial resources. In *Hobbs v. Northeast Airlines*,[33] these factors, plus certain conflict-of-laws problems and the related desirability of preserving opportunities for forum choices, were relied upon in denying class treatment of claims arising from an air disaster. The developing pattern in these cases—pretrial transfer under section 1407, followed by section 1404 transfer for trial of liability issues—was followed in *Hobbs* and worked well. As plane capacities increase, however, major-disaster cases may yet arise in which class treatment would be appropriate, particularly if uniform damage limits are applicable.

The correct choice between class treatment and some other method depends upon the number of potential class members, the magnitude of their individual claims, their enthusiasm for individual litigation and, perhaps, an assessment of whether some discernible public policy would be undermined if a substantial percentage of the class failed to litigate.

The essential difficulty with these alternatives to class treatment is that they require the separate assertion of individual claims, thus necessarily foreclosing a principal goal of rule 23. If the claims are small they cannot feasibly be asserted individually; if the claims are numerous, multiplicity of suits cannot be avoided regardless of amount of the claim. While it is sometimes suggested that the absence of a practicable alternative method of asserting numerous small claims is the concern of the litigants rather than the court,[34]

[33] Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970).

[34] Hackett v. General Host Corp., 455 F.2d 618 (3d Cir. 1972) (dictum).

this author submits that it is difficult to square this view with the language of rule 23. Moreover, irrespective of one's personal assessment of the policy issues involved, nevertheless rule 23 bears the imprimatur of the Supreme Court and Congress.

Rather than relegate small claimants to nonexistent or ephemeral alternative remedies, this author suggests that, when all else fails, re-definition of classes to bring the litigation into manageable size is a workable solution. By defining classes in geographical terms, for example, a series of parallel lawsuits, each of which is manageable, can be established.[35] Discovery and other pretrial matters can be handled in the usual way under section 1407; if necessary, this could perhaps be done on a regional, rather than national, basis, at least for some phases of the lawsuit.

Unless a similar process of fragmentation and load-distribution is adopted, there will continue to be decisions that reject class actions outright, on grounds of sheer magnitude.[36]

V. Notice to Class Members

Notice to members of a rule 23(b)(3) class is mandatory under rule 23(c)(2), which prescribes "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[37] Much of the initial apprehension about the unseemliness and impracticability of a court-directed notice program[38] has now evaporated in the realization that it is entirely possible to adopt a neutral form of notice, issued under the aegis of the court but without direct court involvement. A common technique is to have responses sent to a post-office box address in care of the clerk of the court, and to have a small committee of counsel, from both sides of the case, review

[35] Philadelphia Electric Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). A similar result has been achieved, on a much larger scale and perhaps not solely occasioned by management difficulties, in the antibiotic drug litigation, *in re* Consolidated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 285 (S.D.N.Y. 1971), *mandamus denied*, 449 F.2d 119 (2d Cir. 1971); *see also* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

[36] *E.g.*, City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D. N.J. 1971).

[37] Fed. R. Civ. P. 23(c)(2).

[38] School District of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967).

and tabulate the returns and take appropriate action; any disputes that arise are resolved by the court.

The principal problem areas that remain deal with determining the appropriate means of notice, financing the notice program and prescribing the contents of the notices.

It is impossible within the limits of this presentation to canvass all of the difficulties inherent in attempting to communicate adequately with extremely large numbers of unknown persons. Trade association membership-lists, various specialized directories, and other similar groups can provide a starting-point and the records of the defendants may furnish much useful information. Ultimately, there can be resort to publication, perhaps including broadcast media.

The costs of providing adequate notice can be substantial. Federal courts have been reminded by the Administrative Office of United States Courts that the franking privilege should not be used for class action notices, unless on a prior-reimbursement basis. Ordinarily, the initial costs should be advanced by the proponents of the class, a requirement that imposes no undue burden in most cases, particularly if a goodly number of class members have already expressed interest in the litigation. There can be cases, however, in which this advancement of costs is impossible; it then becomes necessary to consider whether all or part of the costs should be imposed upon the parties opposing the class. If class treatment will probably be approved and there is a reasonable likelihood that the class will ultimately prevail on the merits, notice costs can properly be assessed against the parties adverse to the class. In these situations, notice can be deferred for a reasonable time to permit discovery on the class action issues, and perhaps limited discovery on the merits. Or alternatively, a hearing on these issues can be required.[39]

The notice must cover the three subjects specified in rule 23(c)(2): (i) the right to withdraw, (ii) the binding effect of the judgment otherwise, and (iii) the right to enter an appearance through counsel. Frequently, disputes arise concerning what additional information should be included. Courts must be vigilant to insure that neither side succeeds in perverting the notice to serve its own ends.

[39] Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

The purpose of the notice is to afford potential class members the opportunity to make intelligent decisions with respect to whether to remain in the class. The notice should not urge these potential class members to participate or to discourage them from participation. Accordingly, there should be nothing in the notice that might be interpreted as forecasting the probable outcome of the lawsuit, or as indicating court sponsorship of either side. This author sees no objection to including the names and addresses of counsel, so long as both sides are treated equally, but responses relating to withdrawals or other matters should be directed to be sent to the 'neutral' post-office box address. References to counsel fees and costs, however, should probably be omitted. If any mention of potential liability for these items is made, then it should be coupled with the advice that they will be under the control of the court, and perhaps that they can be expected not to exceed a stated percentage of the recovery. If counsel for the representative parties are committed to a contingent-fee approach, then notice concerning fees should also be mentioned. Needless to say, notice that the action stems from a previous or pending criminal prosecution, or that substantial offers in settlement have already been received, should not be included, except, perhaps, with the unanimous consent of the parties.

In this author's view, it is entirely appropriate, and may often be desirable, to utilize the notice program not only for the purpose of excluding those who opt-out, but also for the purpose of learning the true dimensions of the litigation by identifying those class members who actually intend to follow through with claims for damages. Not only is this information concerning the dimensions of the litigation essential for the ultimate disposition of any recovery (in most cases, at least) but it is extremely valuable to have this information at an early stage, both in connection with management evaluation and in connection with settlement discussions. The initial notice to the class provides a convenient opportunity to obtain this additional "show of hands."

Two points should be made in this connection: (i) This is not equivalent to imposing an "opt-in" requirement. Those who do not request exclusion remain members of the class and will be bound by the judgment in the action; but if, after adequate notice, they really are not interested in the matter, their claims can properly be

disposed of on procedural grounds rather than on the merits. (ii) This is not equivalent to imposing a requirement that individual class members assume any inordinate burden. No elaborate proof-of-claim or detailed statement of claim should be required at this point, but merely a post-card return expressing a willingness to be numbered among the participants.[40]

It is common practice to use the class action notice to give and obtain information in addition to that specified in 23(c)(2).[41]

For example, in one phase of the antibiotic drug litigation,[42] the notice advised class members that if they did not file individual claims by a certain date, they would be deemed to have authorized the state attorney-general to act in their behalf.

VI. Discovery from Class Members

Under present federal discovery practice some kinds of discovery may be had from just about anyone. In class actions, the issue is not whether there may be discovery from 'absent' class members, but rather whether they may properly be subjected to the same kinds of discovery, and with the same kinds of sanctions, as the representative parties. In short, are all class members "parties" to the litigation within the meaning of rule 37.[43]

Since these class members will be bound by the judgment; since rule 19[44] provides that actions must be brought by or on behalf of the real parties in interest; and since rule 23(a) states that "one or more members of a class may sue or be sued as representative parties on behalf of all . . . ,"[45] it is difficult to avoid the conclusion that class members are indeed "parties" to the litigation, at least in a broad sense. And in the classifications embodied in rule 37, class members seem to fit more closely the designation "parties" than the designation "a deponent who is not a party."

To say, however, that party discovery requirements may be applied to absent class members does not mean that this should hap-

[40] This procedure was used in Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

[41] *E.g.*, Knight v. Board of Education, 48 F.R.D. 108 (E.D.N.Y. 1969).

[42] West Virginia v. Chas. Pfizer & Co., Inc., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

[43] Fed. R. Civ. P. 37.

[44] Fed. R. Civ. P. 19.

[45] Fed. R. Civ. P. 23(a).

pen routinely. The special circumstances of class actions must be considered, as must the true purposes of both rule 23 and the discovery rules. It would be clearly improper to permit litigants to frustrate the beneficent purposes of either or both sets of rules by their use of discovery techniques.

It would seem, therefore, that no discovery should be permitted from absent class members unless and until it is clear that the information sought cannot be obtained from representative parties; that no discovery from absent class members should be permitted unless both its purpose and its effect is the disclosure of information which is essential for the proper disposition of the litigation; and that whenever the discovery from absent class members is permitted, the burdens resulting from the discovery must not be disproportionate in relation to the class member's financial stake in the litigation.

There is authority for the proposition that, when all of these requirements are met, the ultimate sanction of dismissal with prejudice may properly be invoked to bar the claims of uncooperative class members.[46]

VII. COMPROMISE SETTLEMENTS

Rule 23(e) makes it clear that no class action may be dismissed or compromised without the approval of the court and that notice of the proposed settlement or dismissal must be given to all members of the class. An alleged class action should be treated as a class action until a contrary determination is made by the court.[47] It is therefore preferable that the class action question should be resolved independently of, and in advance of, issues relating to proposed settlement.

The potential for abuse of the class action device is obvious. The threat of a class action for damages is a potent weapon, and many "threat" cases are filed for the principal purpose of coercing a gen-

[46] Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971) (rule 23 permits discovery from absent class members when necessary or helpful). *But see* Wainwright v. Kraftco Corp., 5 Trade Reg. Rep. ¶ 73,946 (N.D. Ga. 1972) (use of interrogatories to absent class members would end the usefulness of rule 23); Fischer v. Wolfinbarger, 15 Fed. Rules. Serv. 2d 23d.5, 905 (W.D. Ky. 1971).

[47] Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967).

erous settlement of a non-meritorious claim. Conversely, defendants may be inclined to escape their legitimate obligations to the class by buying-off the class representatives.

For these reasons, proposed settlements in advance of the class action determination should automatically be viewed with suspicion. In addition, attempts to avoid decision of the class action issue by amending the pleadings to strike class allegations,[48] dropping a party defendant,[49] weak opposition to motions to strike class allegations,[50] or unopposed motions for dismissal or summary judgment[51] would also be suspect.

The court has a responsibility to the absent class members to protect their interests from being prejudiced by unfair compromise settlements. Accordingly, the relevant facts must be disclosed and, of course, there must be an adequate opportunity for the airing of any objections.[52] In one case,[53] the court's initial refusal to approve a settlement of 1.8 million dollars because of inadequate information resulted in a final settlement [after further facts came to light] in the sum of three million dollars.

Related to settlement issues is the question of award of counsel fees. The potential for abuse in this area must also be recognized, but over-reaction to the supposed dangers should also be avoided. Assuming the usual situation, in which counsel for the representative parties also represents most of the absent class members, counsel's fees and expenses should, of course, be fairly allocated among all who benefited from his labors. But in determining what the attorney's labors are worth, and how the costs should be allocated, counsel in a sense occupies a position of conflict. This is true to some extent in all attorney-client fee determinations (most clients are in effect un-represented, in theory, in the discussions), but the conflict is exacerbated in class actions by the absence of a close attorney-client relationship on a personal-contact basis, by the possi-

[48] *E.g.*, Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970).

[49] *E.g.*, Philadelphia Electric Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967).

[50] *E.g.*, Berger v. Purolator Products, Inc., 41 F.R.D. 542 (S.D.N.Y. 1966).

[51] *E.g.*, Laurenzano v. Texaco, Inc., CCH Fed. Sec. L. Rep. § 92,950 (S.D.N.Y. 1971).

[52] Young v. Katz, 447 F.2d 431 (5th Cir. 1971); Norman v. McKee, 290 F. Supp. 29, 32 (N.D. Calif. 1968), *aff'd*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

[53] Percondi v. Riker-Maxson Corp., 50 F.R.D. 473 (S.D.N.Y. 1970).

ble conflict between the class representative and other class members on the allocation issue and frequently by the magnitude of the sums of money involved in the entire transaction.

Thus the determination and allocation of counsel fees requires close supervision by the court to insure fairness. But if the individual net recoveries by claimants are satisfactory to the class members, and reasonably approximate their actual damages, and if all claimants are treated alike, then a counsel fee should not be regarded as excessive merely because it seems generous in terms of hourly rates for the time spent. So long as civil actions for damages remain a significant tool for enforcement of salutary statutes and regulations, the notion that there must be sufficient compensation to provide incentive for these 'private attorneys-general' cannot be discarded.

VIII. CONTROLLING COMMUNICATIONS

Both because of the unique relationship between class-action counsel and his unknown clients, and because questions of claim-solicitation, maintenance and champerty have not yet been legalized, it is generally deemed prudent to prohibit direct or indirect communications between counsel and the representative on the one hand, and absent members of the class on the other. An exception, however, would be the communication from the absent class member with court approval.[54] In many districts local court rules have been adopted to that effect. It is desirable to impose similar restrictions upon counsel for the parties opposing the class for obvious reasons.

While these restrictions were initially greeted with protest in some cases, experience has shown that the foregoing limitations do not have any adverse effect upon the proper functions of counsel; legitimate communications are, of course, freely approved by the courts.

IX. DETERMINING DAMAGES; 'FLUID RECOVERY'; PARENS PATRIAE

When liability to a class of plaintiffs has been established or conceded, and the class contains thousands, even millions, of members,

[54] *See* MANUAL ON COMPLEX AND MULTI-DISTRICT LITIGATION, § 1.61 (rev. ed. 1971).

the assessment of damages is indeed a formidable task. As previously discussed,[55] this author is convinced that the problem can be greatly simplified by early weeding out the disinterested members, leaving only the claims that are actually being asserted. But this is not the only possible view of the matter;[56] about all that can be said with confidence is that the law is still evolving.

Can the class representative establish the correct amount of damages owed to unidentified class members? In many cases, a reasonably close approximation of the correct figure can probably be arrived at without participation by the silent members. But does the representative have the right to assert such claims? And does he have the right to collect the money? Rule 23 is unclear, however, concerning the extent of the representative's permissible involvement in these matters.

If the action has been approved for class treatment only with respect to liability issues, it is difficult to see how the class representative acquires standing to pursue damage determinations. Further refinement of the order approving class treatment might make this a closer question, however; for example, by specifying certain damage issues as appropriate for class determination. The question then would be whether class representation only to the specified factual and legal damage issues carries with it the right to act as a representative on the non-class damage issues. The predominance of common issues in the first place must be decided, as must the seeming desirability of assessing predominance within the three broad areas of wrong, impact and damages, rather than on a more narrow basis.

It would seem that the conceptual difficulties that permeate this aspect of the application of rule 23 may stem from a certain incompatibility between two concepts embraced by the rule: 23(a) provides that the numerous class will "sue or be sued" via the representative party; while 23(c)(4) provides for class treatment of particular issues. The whole (the lawsuit) being is not ordinarily equated with the part (the particular issue). That is, one does not ordinarily "sue" except by asserting all of the elements of a cause of action; and one does not recover damages except by establishing all of these elements. Rule 23 apparently contemplates that the rep-

[55] *See* note 46 *supra.*

[56] *See* Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969).

resentative is to allege the entire cause of action and prove most of it; but whether he is authorized to prove non-class issues and see to the distribution of the proceeds is less clear.

Enthusiasm for rule 23 as a vehicle for enabling small claimants to obtain justice does not necessarily justify a court in insisting that the defendants must pay all of the damages they probably caused; i.e., whether those injured seek justice. This is not the normal function of a court in civil litigation. The disciplinary benefits of treble damage actions can be adequately secured by exacting less-than-total retribution.

When it is not feasible to distribute directly the recovery to those damaged, as in cases of widespread overcharges to users of public transportation, for example,[57] there is an appealing quality of poetic justice in requiring the recoveries to be applied for their indirect benefit; but query whether this kind of enforcement is not better left to administrative agencies.

Of course, the premise that silent class members are not claiming their individual damages may be unsound if the class representation actually extends to that issue. The "parens patriae" doctrine is sometimes invoked to permit a sovereign, acting through a designated public official, to represent the citizenry in this regard. The recent decision of the Supreme Court in *Hawaii v. Standard Oil Co.*,[58] holding that there is no cause of action under the antitrust laws for damage to the general economy of a state, seems to leave open the use of the "parens patriae" approach under rule 23 in certain of cases. Presumably, different results may be reached depending upon varying state laws governing the authority of the public official to perform such functions, upon the nature of the litigation and the identifiability of class members.

X. Appealability of Class Action Orders

In *Eisen v. Carlisle & Jacquelin*,[59] the Second Circuit has adopted

[57] *E.g.*, Bebchick v. Public Utilities Comm'n, 318 F.2d 187, 203 (D.C. Cir. 1963).

[58] State of Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251 (1972).

[59] Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966). For other applications of this doctrine, *see* Caceres v. International Air Transp. Ass'n, 422 F.2d 141 (2d Cir. 1970); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1968).

the rule that interlocutory appeal from an order denying class treatment is permissible if the order would, as a practicable matter, terminate the litigation. In *Hacket v. General Host Corporation*[60] the Third Circuit has rejected this approach, on the grounds of its unequal application and unworkability. Under the Third Circuit view, appellate review can be obtained only through discretionary certification under section 1292,[61] entry of judgment under rule 54(b)[62] or perhaps mandamus.

At issue is the application of the "collateral order" doctrine laid down in *Cohen v. Beneficial Finance Co.*,[63] in which the Supreme Court upheld the right of interlocutory appeal from an order requiring plaintiff to post a bond as a condition of continuing with the lawsuit. The Court stressed the serious effect of the order appealed from, its severability from the merits of the case and the probability of irreparable harm if appellate review were deferred until final judgment.

It is true that a denial of class treatment does not expressly bar plaintiff's individual claim, nor does it terminate the claims of putative class members. The *Eisen* and *Hackett* opinions do not consider the question of the effect of an order denying class treatment upon later attempts by other class members to maintain a class action. If the denial would not affect the later attempts, the courts' preoccupation with the amount of the named plaintiff's individual claims appears justified there might be a gratifying shift of consummer class actions from the Third Circuit to the Second. But if, as seems more realistic, the original denial would bar all other attempts to seek class treatment then the "death knell" would be sounded in every case when any substantial number of claims could not otherwise be litigated. At a minimum, the appealability could not be resolved without considering the merits of the order appealed from.

Thus, in view of the extremely broad discretion conferred upon district courts in deciding class action issues, a strong argument can be made that interlocutory review is desirable to eliminate oc-

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[60] Hackett v. General Host Corp., 455 F.2d 618 (3d Cir. 1972).

[61] 28 U.S.C. § 1292 (1970).

[62] FED. R. CIV. P. 54(b).

[63] Cohen v. Beneficial Finance Corp., 337 U.S. 541 (1949).

casional instances of apparent arbitrariness and to promote uniformity of standards.[64]

In summary, as the foregoing review indicates, not all problems concerning rule 23 have yet been satisfactorily resolved. But counsel and the courts have shown willingness to be creative and cooperative in devising workable solutions. Already rule 23 is an undoubtedly useful tool in handling complex litigation and may ultimately prove to have been one of the most significant procedural developments of the century.

[64] *See* Note, *Interlocutory Appeals from Order Striking Class Action Allegations*, 70 COLUM. L. REV. 1292 (1970).